NOOR HAIYATI SAAD & ANOR.

v.

SAID ISMAIL

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CIVIL APPEAL NO. 12-09-1989]
16 JUNE 1991

EVIDENCE: *Accident claim - Liability - No clear evidence as to direction of vehicles - Admision made by driver of one of the vehicles one day after the accident - Whether first investigation report - Admissibility - Privileged - First information report - Statement made in the course of police investigation - Criminal Procedure Code, ss. 111, 112, 113 - Evidence Act 1950, ss. 17, 18, 21.*

In an accident which involved a motor-cycle and a lorry, there was only one witness, the 1st plaintiff, N, who was riding pillion on the motor-cycle. At the trial, the Sessions Judge held that neither N's evidence nor the sketch plan was helpful in showing the direction in which the lorry was travelling. The lorry driver had made a police report 1 day after the accident where he admitted that he was travelling in a direction opposite to that of the rider of the motor-cycle. This admission corroborated N's evidence that the rider of the motor-cycle was riding on the correct side of the road and that the rider did not attempt to, nor did he, overtake any vehicle. The Sessions Judge held that this report was inadmissible as it was privileged because it was a statement made during the course of police investigation. The plaintiffs' claim was therefore dismissed.

The plaintiffs' appealed on the basis that the report should have been admitted under ss. 17, 18 and 21 of the Evidence Act 1950 (the Act) as this report was a first information report and not a statement made in the course of police investigation under the Criminal Procedure Code, CPC.

Held:

[1] The police report made by the lorry driver, although set out in the format of an information report under s. 111 of the CPC, was not a first information report as it was made 1 day after the accident and after police investigation had started; as such this report was absolutely privileged.

[2] As there was no evidence before the Sessions Court to show the direction in which the lorry was travelling, there was no evidence to show how the accident had occurred and the plaintiffs had failed to prove that the defendant was liable.

[Appeal dismissed.]

Cases referred to:

Bishen Das v. Ram Labhaya [1916] AIR Lahore 133
Dawkins v. Lord Rokeby [1875] LRHL 744
M.A. Clyde v. Wong Ah Mei & Anor. [1970] 2 MLJ 183
Martin Rhienus v. Sher Singh [1949] MLJ 201
Methuram Dass v. Jaggannath Dass ILR 28 Cal 794
Rengasamy Chettiar v. Periasamy [1937] MLJ xxv
State of Gujarat v. Hiralal Devji [1964] AIR Gujarat 261

Legislation referred to:
Criminal Procedure Code ss. 107, 111, 112, 113
Evidence Act 1950, ss. 17, 18, 21

For the appellant - Nadarajan; M/s. Nadarajan & Co.
For the respondent - Ernest Theseira; M/s. V.P. Nathan & Partners

JUDGMENT

KC Vohrah J:

This is an appeal against the decision of the learned Judge of the Sessions Court, Alor Setar on the issue of liability in respect of an accident claim.

The accident involved a motor cycle and a lorry. There was only one witness, the 1st plaintiff, who testified as to what had happened at the accident. She was the pillion rider of the motor cycle which was ridden by her husband, now deceased (whose estate claims in the suit are represented by two administrators of his estate, the two second plaintiffs). Her evidence was sketchy and not helpful. Though it was an agreed fact that an accident occurred between the motor cycle and the lorry, no oral evidence was adduced at the trial to show the direction in which the lorry was travelling at the time of the accident. Defence Counsel at the close of the plaintiff's case submitted there was no case to meet. The learned Judge held that the plaintiffs had not proved their case.

The accident occurred on 8 June 1983 at about 9 p.m. along the Sungai Petani - Alor Setar road. The 1st plaintiff, the pillion rider, said that her husband was riding about ½ metre from the edge of the road in the direction of Alor Setar, riding on the correct side of the road. She heard a bang; she fell, and she became unconscious. She said that her husband had not overtaken nor did he attempt to overtake any vehicle before the accident. She was unable to say whether there was any other vehicle on the road. In other words she could not state where the defendant's lorry was in relation to the motor cycle, let alone the direction in which it was travelling.

The sketch plan shows the deceased's motor cycle lying partly on the road and partly on the sidetable on the same correct side of the road along which the deceased had ridden. The plan shows broken pieces of glass and bloodstains at a point 1.6 metres from the left side of the road and located near the fallen motor cycle. The learned Judge did not find the sketch plan helpful. I agree with her on that.

There was a report of the driver of the lorry which was included in Part II of the agreed bundle meaning that there was dispensation of formal proof of its existence though the contents were not admitted. In that report made 1 day after the accident, on 9 June 1983 at 1.30 p.m., the driver admitted that he was travelling in a direction opposite to that of the rider of the motor-cycle. If that admission had been considered by the Court it would have meant that the plaintiff had, *ex facie*, proved their case as the 1st plaintiff had testified that her husband was riding on the correct side of the road, ½ metre from the left edge of the road and that he had not overtaken nor had he attempted to overtake any vehicle. And since the defendant did not make his defence (he was absent) it would have meant judgment should have been entered in the plaintiffs' favour. But the Judge held that the report was inadmissible. Counsel for the plaintiffs argued that the Judge, Madam Ho, was wrong in holding the report inadmissible. He argued that the admission in the report of the driver of the lorry that he

was travelling in a direction opposite to that of the rider of the motor cycle, being a first information report and not a statement made in the course of police investigation under the Criminal Procedure Code (CPC), should have been admitted under ss. 17, 18 and 21 of the Evidence Act 1950. He relied on the Federal Court case of *M.A. Clyde v. Wong Ah Mei & Anor*. [1970] 2 MLJ to support his argument. This is what Gill FJ (as he then was) said in that case at p. 183:

> It is contended for the appellant that the police report was in fact a statement in the course of police investigation because the evidence was that he arrived at the scene at 10.30 p.m., whereas the police report was taken down at 10.50 p.m. before which time he had carried out some investigations. And it is argued on that basis, on the authority of *Rengasamy Chettiar v. Periasamy* [1937] MLJ xxv and *Martin Rhienus v. Sher Singh* [1949] MLJ 201, that the statement was absolutely privileged and therefore should not have been admitted in evidence.
>
> I do not agree that the police report was in the nature of a statement in the course of investigation... I am ... satisfied that the report was made before any investigation took place. In the circumstances, the police report was clearly a first information report and not a statement in the course of police investigation, so that the two cases relied upon for its rejection are wholly inapplicable.
>
> On the assumption that the police report was a first information report, it was contended by Counsel for the appellants, on the authority of *State of Gujarat v. Hiralal Devji* [1964] AIR Gujarat 261, that it was not substantive evidence and could only be used to corroborate or contradict the maker of that report. The short answer to that is the provisions of the Criminal Procedure Code do not apply to a civil action. **In my judgment if a first information report contains an admission which is relevant to a claim in a civil action against him, it is admissible in evidence under ss. 17, 18 and 21 of the Evidence Ordinance 1950.** I find support for this from the decision in *Bishen Das v. Ram Labhaya* [1916] AIR Lahore 133, with which I respectfully agree, and which went so far as to say that though an admission of guilt made by a defendant to a police officer is not receivable in evidence as a "confession" as against him if he is on his trial as an accused person, yet it is acceptable in a civil suit as an admission under ss. 17, 18 and 21 of the Evidence Act. The admission, of course, cannot be regarded as conclusive, and it is open to the person who made it to explain it away, which was not done in this case. (Emphasis mine).

The point about the police report made on 9 June 1983 by Abdullah bin Said, the driver of the lorry that was involved in the accident, is that it was made 1 day after the accident had occurred and after police investigation into the accident had commenced. The accident took place on 8 June 1983 at about 9 p.m. and police investigation started the very night of the accident and this is clear from the undisputed contents of two reports (which were included in part 1 of the agreed bundle), one a police report and another, a medical report, admitted in evidence. The first report is a police report, Alor Setar Report No. 6034/83, by Constable Jamal Saad made on 8 June 1983 at 10 p.m. at Balai Polis Trafik that he had received information relating to the accident. The medical report from a doctor at the General Hospital, Alor Setar states that Fadzil bin Ismail (the rider of the motor-cycle which met with the accident), was brought to the General Hospital, Alor Star on 8 June 1983 at 10 p.m. by the police. It is a fair and reasonable inference that the police had gone to the scene of the accident and had started investigation.

Thus it seems clear that the police report made by the driver of the motor-lorry 1 day after the accident is not a first information report. It was a report made after police investigation had started although it is set out in the format of an information report under s. 107 of the

Code. The then F.M.S. Court of Appeal in 1949 in *Martin Rhienus v. Sher Singh* made reference to this section, s. 112, as well as to s. 111 of the CPC (these sections have remained unamended save for an addition of an extra paragraph, para. (v), to s. 112 by Act A365 which will not affect what I have to say). William CJ had this to say of a statement made under s. 112 of the CPC:

> By ss. 111 and 112 of the Criminal Procedure Code, when a police officer makes an investigation:
>
> (1) he may require any person to attend before him;
>
> (2) if such person does not so attend a warrant may be issued to enforce his attendance;
>
> (3) the police officer may interrogate such person on attendance; and
>
> (4) such person is bound to answer truly all questions put to him by the police officer making the investigation.
>
> In India, where the law relating to a police investigation is similar to the local law, it was decided in *Methuram Dass v. Jaggannath Dass* ILR 28 Cal. 794 that a statement made in the course of a police investigation was absolutely privileged. The reasoning in the judgment in that case is:
>
> > In the present case the investigation was required by law; it was conducted under the provisions required by the law, it was ancillary to the administration of justice. The defendant was bound by law to answer all question put to him by the police officer conducting the investigation and was punishable if he answered untruly and what was said by him had reference to the matter under investigation. Virtually the only distinction between his position and that of an ordinary witness arises from the fact that his statement was not made in a Court of Justice, and we see no reason accordingly, to use the language of the Lord Chief Baron cited above - that was in the case of *Dawkins v. Lord Rokeby* [1875] LRHL 744 - why public policy should not equally prevent an action being brought against him as against a witness in an ordinary Court of Justice.
>
> I agree with that decision and the reasoning for it.

In the earlier Singapore case of *Rengasamy Chettiar v. Periasamy* the Singapore Court made reference to the then equivalent section in the Straits Settlements Code to s. 113 of the FMS Code. In that case Whitley J held a statement made in the course of police investigation was admissible for the purpose only of impeaching the credit of the maker. It has to be noted that the present s. 113 of the CPC is a different provision from its equivalent provision in Singapore in 1937 when *Rengasamy Chettiar* was decided or in 1949 when *Martin Rhienus* was decided; it was amended in 1976 by A324.

In any event that point of law decided in *Rengasamy Chettiar* does not seem to arise in the context of the Court of Appeal holding that a statement made in the course of a police investigation is absolutely privileged. William CJ at p. 203 said:

> The question was raised by the Court whether the provisions of s. 113 of the Criminal Procedure Code prevent a statement from being given in evidence at all, even in civil proceedings, but having decided that statements made under s. 112 are absolutely privileged it is not necessary for me to decide this further question...

There being no evidence before the Sessions Court to show the direction in which the lorry of the defendant was travelling, there was no evidence to show that how the accident took place; the plaintiff had failed to prove that the defendant or his servant was at fault. And the Judge of the Sessions Court was right in dismissing the plaintiffs' claims at the close of their case.

The appeal is therefore dismissed with costs.

Also found at [1991] 2 CLJ 1564